****NOT FOR PRINTED PUBLICATION****

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JAMES MATHEWS, JR.,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION No. 1:11CV268
v.	§	
	§	
CITY OF BEAUMONT; BECKY AMES; TYRONE COOPER; and ANNE HUFF,	§	JUDGE RON CLARK
	§	
Defendants,	§	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the court is Defendants' (City of Beaumont, Becky Ames, Tyrone Cooper, and Anne Huff), motion to dismiss Plaintiff James Mathews Jr.'s second[1] amended complaint.[2] [Doc. # 31].[3] Plaintiff filed suit under 42 U.S.C. § 1983 alleging Defendant, the City of Beaumont, through its mayor, city attorney, and fire chief, violated his constitutional right to privacy[4] by obtaining Plaintiff's police investigation records in violation of the Texas Open Records Act, Tex. Gov't Code Ann. § 552.001 *et seq*., distributing the records to one or more city council members, and then attempting to use the records during an arbitration proceeding. Plaintiff also brings suit under 42 U.S.C. § 1985 alleging that Defendants conspired to fire him from his position as a firefighter and/or intimidate him in retaliation for filing his original complaint.[5] After reviewing the motion, responses, and pleadings and accepting all well-pled facts as true, the court finds that Plaintiff has failed to state a claim and is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

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[1]Plaintiff has since filed a third amended complaint [Doc. #36], but has indicated to the court that this most recent complaint only corrects a typographical error contained in the second amended complaint. The court will therefore use Plaintiff's third amended complaint when analyzing this motion.

[2]Plaintiff contends that Defendants' motion to dismiss is harassing in that it is 55 pages long, in violation of the local rules. [Doc. #35 at 1]. However, when Defendants filed their motion for leave to file excess pages [Doc. #30], Plaintiff was unopposed. Accordingly, the court granted the motion. [Doc. # 33].

[3]Also on the docket is Defendants' first motion to dismiss Plaintiff's original complaint [Doc. # 2]. In light of Defendants' motion to dismiss Plaintiff's second amended complaint, Defendants' first motion [Doc. #2] is denied as moot.

[4]Plaintiff also claims Defendants deprived him of his constitutional rights under the Fourth Amendment, he was denied equal protection under the law, deprived of property without due process of law, and was subjected to cruel and unusual punishment (presumably in violation of the Eighth Amendment). It is clear based on his complaint, that these claims are substantially

I. BACKGROUND

On October 7, 2008, Plaintiff James Mathews Jr. was involuntarily suspended from his fire fighter position with the City as a result of being charged with aggravated assault, specifically, using his vehicle to stop a drug intoxicated driver. On July 21, 2009, Mr. Mathews was found not guilty of the offense. Mr. Mathews claims that his criminal record was thereafter expunged. At some point, Mr. Mathews appealed his suspension to an independent third party

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subsumed under his privacy claim. All of Plaintiff's claims are based on Defendants obtaining and distributing his investigative records which he alleges were privileged. "The prohibition against government dissemination of private information, once thought to reside in the 'shadows cast by various provisions,' is found in the 'Fourteenth Amendment's concept of personal liberty.' " *Zuffuot v. City of Hammond*, 308 F.3d 485, 489 (5th Cir. 2002).

[5]Plaintiff's response to Defendants' motion to dismiss mentions claims for slander as well as claims under the Texas Tort Claims Act. Although both claims are mentioned in Plaintiff's *original* complaint, neither are pled in Plaintiff's third amended complaint. The Texas Tort Claims Act is not mentioned at all in Plaintiff's third amended complaint. Accordingly, that claim is waived. Although Plaintiff casually mentioned slander in his third amended complaint, this was only mentioned as a means to purportedly augment his section 1983 claim. [Doc. #36 at 14]. Plaintiff's third amended complaint specifically only lists *two* causes of action: one pursuant to section 1983 and one pursuant to section 1985. [Doc. #36 at 10, 14]. To the extent that Plaintiff intended to pursue state law claims in his complaint, they are not pled.

hearing examiner pursuant to Tex. Loc. Gov't Code Ann. § 143.057(a). A hearing examiner subsequently reinstated Mr. Mathews and ordered back pay. The City appealed.

On April 29, 2011, Mr. Mathews brought suit under Section 1983 for Defendants allegedly obtaining his criminal investigative file—which purportedly contained his National Crime Information Center (NCIC) records—from the Beaumont Police Department subsequent to his suspension. Mr. Mathews alleges that Defendants distributed these police department records to one or more city council members and then attempted to use the records as evidence before the hearing examiner.

On August 31, 2011, the state court of appeals vacated the hearing examiner's decision on the basis that the hearing examiner exceeded his authority in reinstating Mr. Mathews without an evidentiary hearing. The Ninth District Court of Appeals decision also reversed the district court's order requiring the City to comply with the hearing examiner's decision. *See City of Beaumont, Texas v. Mathews*, 09-10-198, 2011 WL 3847338 (Tex. App.— Beaumont, Aug. 31, 2011, no pet.).

On September 27, 2011, Fire Chief Anne Huff wrote Mr. Mathews a letter. In the letter, Chief Huff informed Mr. Mathews that his indefinite suspension was reinstated based on the Court of Appeals's decision. The letter further provided that since the hearing examiner's order of reinstatement was void, Mr. Mathews was required to reimburse the City for the back pay he improperly received. Finally the letter required Mr. Mathews to return all City issued equipment and clothing, stating that failure to timely do so would result in the City filing theft charges. Mr. Mathews subsequently filed a second amended complaint to add a cause of action under 42

U.S.C. § 1985, contending that based on the above actions, the Defendants attempted to intimidate him so Mr. Mathews would dismiss his Section 1983 suit.

II. STANDARD OF REVIEW

Defendants move for dismissal of Plaintiff's claims under Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) provides that a party may move a court to dismiss an action for "failure to state a claim upon which relief can be granted." When ruling on a Rule 12(b)(6) motion, the court may consider only the complaint and its proper attachments. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008). On motion under Rule 12(b)(6), the court must decide whether the facts alleged in the complaint, if true, would plausibly entitle the plaintiff to some legal remedy. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007).

The court must accept all well-pleaded facts as true, reviewing them in the light most favorable to the plaintiff. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 372 (5th Cir. 2010). However, the court need not accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949-50. The factual allegations in the complaint must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949.

III. DISCUSSION

1. Plaintiff's Section 1983 Claim

Plaintiff alleges he has a legitimate expectation of privacy in his investigative file based on the Texas Open Records Act, Tex. Gov't Code Ann. § 552.108, 552.352 and the Tex. Code

Crim. Proc. Ann. § 55.04(1) and (2). Plaintiff further alleges that he has a legitimate expectation of privacy in his National Crime Information Center information (NCIC) based on 28 U.S.C. § 584(b), 42 U.S.C. § 3789g, and 28 CFR Ch. 1 Part 20. The statutes and regulation cited by Plaintiff do not create a legitimate expectation of privacy in investigative materials.

A. Types of privacy rights

There are two different rights to privacy: one protects an individual's interest in avoiding disclosure of personal matters and the other protects an individual's interest in making certain personal decisions free of government interference. *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir. 1996). In the context of government disclosure of personal matters, an individual's constitutional right to privacy is violated if: 1) the person had a legitimate expectation of privacy; and 2) that privacy interest outweighs the public need for disclosure. *Id.* An expectation of privacy with regard to a certain zone of personal information may be legitimate where statutes recognize its confidential character. *National Treasury Employees Union v. U.S. Dept. of Treasury*, 25 F.3d 237, 243 (5th Cir. 1994).

B. The Texas Open Records Act does not create a legitimate expectation of privacy in investigative materials

The Texas Open Records Act—somewhat artfully referred to by Plaintiff as the Texas Privacy Act— provides that all information held by public officials or employees is subject to public disclosure unless excepted. Tex. Gov't Code Ann. § 552.021, 552.022. The purpose of the Act is to grant people access to information so that they "may retain control over the instruments they have created." *Id*. at § 552.001. To that end, the provisions of the Act are to be "liberally construed" in favor of disclosing government-held information. *Id.*

1. The Texas Open Records Act provisions cited by Plaintiff are inapplicable

Plaintiff cites two exceptions to the Act which purportedly give him a privacy interest: Section 552.108 and Section 552.352(a). Section 552.108, termed the law enforcement exception under the Act[6], provides that information held by a law enforcement agency dealing with the detection, investigation, or prosecution of crime is *excepted* from disclosure under the Open Records Act if: "(1) release of that information would interfere with the detection, investigation, or prosecution of crime; [or] (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication." The purpose of this exception is not to provide suspects with a right to privacy, but rather, to prevent law enforcement and crime prevention techniques from being readily available to the public at large. *See Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.—El Paso 1992, writ denied).

Section 552.352 provides that "[a] person commits an offense if the person distributes information considered confidential under the terms of this chapter." Nowhere in this section or elsewhere in the Act does it say that police department records are confidential.

2. The cases cited by Plaintiff are inapplicable

Mr. Mathews cites three cases which he claims support his claim that the Texas Open Records Act creates a right to privacy. Two deal with statutes from other states and all three are distinguishable.[7]

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[6]*See Morales*, 840 S.W.2d 519 at 525 (interpreting former Section 552.108).

[7]In *Westwood*, 2007 WL 441692 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding [mand. denied]) the plaintiff sought to compel production from the Houston police department, a non-party in the case, contending that the department's investigatory materials were critical to

3. The voluntary disclosure provision of the Act allows for disclosure

The Texas Open Records act has a voluntary disclosure provision. *See* Section 552.007. This provision provides that nothing in the Open Records Act prevents the government from voluntarily making part or all of its information public, unless the disclosure is expressly prohibited by law, or the information is confidential under the law. There is no authority that the disclosure of investigative files is legally prohibited or that such files are legally confidential. Accordingly, the disclosure of such information is not a violation of Mr. Mathews's right to privacy: the Beaumont Police Department was free to disclose the information and the Defendants were allowed to accept it.

C. The Texas Code of Criminal Procedure does not create a legitimate expectation of privacy in investigative materials

Plaintiff contends that Defendants attempted to use the allegedly expunged files in his arbitration in violation of Tex. Code Crim. Proc. Ann. § 55.04(1) and (2). [Doc. #36 at 3]. Section 55.04(1) provides that an officer or employee who acquires knowledge of an arrest and knows of an order expunging the records and files relating to that arrest, commits an offense if he knowingly releases, disseminates or otherwise uses the records or files. Even assuming the

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his defense in a civil matter. The court held that *law enforcement* can claim a law enforcement privilege when answering *discovery requests* in civil litigation. The court did not hold that a person has a privacy right in his investigative file. The statutes at issue in *Roggio,* No. 10-40076-FDS, 2011 U.S. Dist. LEXIS 34731 (D. Mass, March 30, 2011) and *Soucie v. County of Monroe et. al*, 736 F. Supp. 33 (WD NY, 1990), have no analog in Texas.

Defendants had such knowledge, this criminal statute does not bestow a suspect with any right to privacy.

D. Neither 42 U.S.C. § 3789g, 28 U.S.C. § 534, 28 CFR § 20, nor the Texas Attorney General Handbook provide Plaintiff with a reasonable expectation of privacy in his National Crime Information Center (NCIC) records

Plaintiff further contends that 42 U.S.C. § 3789g, 28 U.S.C. § 534[8], and 28 CFR § 20 provide him with a reasonable expectation of privacy in his NCIC records. Neither these statutes or regulation provide Plaintiff with a reasonable expectation of privacy, much less one enforceable under Section 1983.

1. 42 U.S.C. § 3789g

The only subsection of § 3789g even arguably applicable in this case is § 3789g(b), which addresses the confidentiality of criminal history information. However, that subsection only imposes obligations on the Office of Justice Programs. When a statute imposes no direct obligations on the states, and instead places 'the onus of compliance with the statute's substantive provisions on the federal government," there is no § 1983 claim. *Audette v. Sullivan*, 19 F.3d 254, 256-57 (6th Cir.1994) (quoting *Stowell v. Ives*, 976 F.2d 65, 70 (1st Cir.1992)); *Clifton v. Schafer*, 969 F.2d 278, 283-85 (7th Cir.1992).

Plaintiff specifically alleges that subsection 3789g(d) confers him a reasonable expectation of privacy. However, subsection 3789g(d) is simply the penalty provision which is only applicable if a person violates any provision of the section, rule, regulation or order issued thereunder. Defendants have not violated any provisions of section 3789g.

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[8] Plaintiff actually cites to 28 U.S. C. § 584. However, the court believes Plaintiff meant to cite to 28 U.S.C. § 534.

2. 28 U.S.C. § 534

Only subsections (a), (b) and (f) are remotely applicable to the facts of this case. However, nothing in these subsections provides persons such as Mr. Mathews with a reasonable expectation of privacy. Subsection (a)(4) authorizes the Attorney General to disseminate such information to certain entities. Subsection (b) simply provides that the exchange of records is subject to cancellation if the Attorney General exchanges records with unauthorized entities. Subsection (f) provides that"[n]othing in this subsection shall be construed to permit access to such records for any other purpose." This simply means that nothing *in subsection (f)* permits access to records for any other purpose— not that access is never permitted for other purposes.

3. 20 CFR § 20

28 CFR § 20 is the federal regulation which interprets 28 U.S.C. § 534. Mr. Mathews does not mention which part of the regulation Defendants allegedly violated; however, the court assumes Mr. Mathews is referring to Section 20.1 which states the purpose of the regulation.[9]

Simply because the purpose of a regulation is to protect individual privacy, does not mean that the statute confers plaintiffs with such an enforceable *right*. Whether a federal statute or regulation confers an enforceable right turns on whether "the provision in question was intended to benefit the putative plaintiff." *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509, 110 S. Ct. 2510, 2517 (1990). If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit (or unless the interest the plaintiff asserts is “too vague and amorphous” such that it is “beyond the competence of the judiciary to enforce.”) *Id.* Neither 28 U.S.C. § 534, nor 28 CFR § 20 evidence a congressional or regulatory intent to benefit subjects of investigations such as Mr. Mathews. The statute and regulation merely reflect a congressional preference for confidentiality, not a binding obligation on federal or local governments.

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[9]Section 20.1 provides "[i]t is the purpose of these regulations to assure that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to ensure the accuracy, completely, currency, integrity, and security of such information and to protect individual privacy."

4. Texas Attorney General Handbook

Mr. Mathews argues that the Texas Attorney General’s 2012 Public Information Handbook provides him with a reasonable expectation of privacy. Specifically, Mr. Mathews refers to page 101 of the handbook which provides in relevant part: “[w]here an individual’s criminal history information has been complied or summarized by a governmental entity, the information takes on a character that implicates the individual’s right of privacy in a manner that the same individual’s records in an uncompiled state do not . . .”

The Texas Attorney General’s handbook is not binding on this court, nor does it create a right of privacy. The handbook, which is a guide, not a statute or regulation, appears to be referring to the common law right to privacy. The question of whether a *federal constitutional* right to privacy has been violated is a distinct question from whether a state common law right to privacy has been violated. *Zaffuto v. City of Hammond*, 308 F.3d 485, 491 (5th Cir. 2002).

2. Plaintiff’s Section 1985 Claim

Plaintiff further contends that Defendants conspired to interfere with his civil rights in violation of 42 U.S.C. § 1985 when they conspired to intimidate and/or retaliate against him for the filing of his original complaint.

A. Applicable Law

42 U.S.C. § 1985 creates a private civil remedy for three prohibited forms of conspiracy to interfere with civil rights. Mr. Matthews alleges that Defendants violated subsection (2) and (3). Subsection (2) prohibits conspiracies to deter by force, intimidation or threat, any party or witness in any court of the United States from attending such court or from testifying to a matter pending or from conspiring to deny any citizen equal protection of the laws. Subsection (3) prohibits conspiracies to deprive any person or class of persons the equal protection of the laws and those aimed at preventing a person from lawfully voting. 42 U.S.C. § 1985; *See also Montoya v. Fedex Ground Package System, Inc*. 614 F.3d 145, 149 (5th Cir. 2010).

To state a claim under Section 1985(3) the conspiracy at issue must have a racially based animus, which Mr. Mathews did not plead. *Lockett v. New Orleans City*, 607 F.3d 992, 1002 (5th Cir. 2010). In order to prevail on a section 1985(2) claim, a plaintiff must establish: (1) a conspiracy between two or more persons; (2) to deter a witness by force, intimidation, or threat from attending federal court or testifying freely in a matter there pending; which (3) causes injury to the claimant. *Mitchell v. Johnson*, 2008 WL 3244283, *2 (5th Cir. Aug. 8, 2008).

The "gist of the wrong at which § 1985(2) is directed is . . . intimidation or retaliation against witnesses in federal-court proceedings." *Haddle v. Garrison*, 525 U.S. 121, 125, 119 S. Ct. 489, 492 (1998). The statute therefore proscribes intimidation or retaliation taken against witnesses or parties who have already testified or who *plan* to testify. *Montoya*, 614 F.3d at 149. However in order for individuals to be liable under Section 1985(2), the predominant purpose of the conspiracy must have been to injure the party or witness *in order* to deter him from attending or testifying in federal court. *Id.* (emphasis in original).

B. Analysis

In support of his Section 1985(2) claim, Mr. Mathews alleges that (1) Defendants illegally used public funds to cover up their conspiracy; (2) wrote Plaintiff a threatening letter terminating his employment, which was personally delivered by armed escort; and (3) slandered him. [Doc. # 36 at 17]. The court will address each of these alleged acts in turn.

1. Use of public funds to aid in defense

Mr. Mathews contends that Defendants illegally used public funds to cover up their conspiracy by hiring lawyers to defend against his claims. Whether the individual defendants were entitled to use public money in their defense is not at issue before this court. It certainly does not establish a Section 1985 violation, nor does Mr. Mathews cite to any authority to support this idea.

2. The September 27, 2011 letter from the Fire Chief to Mr. Mathews

Mr. Mathews cites a September 27, 2011 letter written to him from Fire Chief Anne Huff as evidence of a Section 1985 violation. In the letter, Chief Huff informed Mr. Mathews that his indefinite suspension was reinstated based on the Ninth Court of Appeals's decision in *City of Beaumont, Texas v. Mathews*, 2011 WL 3847338 (2011), which vacated the hearing examiner's decision requiring the City reinstate Mathews, and reversed the trial court's order upholding the hearing examiner's decision. The letter also stated that since the hearing examiner's order of reinstatement was void, Mr. Mathews was required to reimburse the City for the back pay he received for time he did not physically work for the City. The letter further stated "You are in possession of City issued equipment and clothing that must be returned to the City. All City issued equipment and clothing must be returned to the City within 21 days of the date of this memo, or October 18, 2011. Failure to return all such equipment and clothing will cause the filing of theft charges against you on October 19, 2011."

Mr. Mathews contends that this letter violated Section 1985 in three ways. First, the letter allegedly contained threatening language demanding he reimburse the City for back pay he received and threatened to file theft charges if Mr. Mathews did not return City equipment and clothing to the City. Second, the letter makes improper reference to the Court of Appeals decision which Plaintiff alleges did not entitle the City the right to re-fire him. Third, Chief Huff personally delivered the letter to Mr. Mathews accompanied by armed Beaumont Police Department officers. Mr. Mathews alleges that this method of delivery heightened the intimidation placed on him, his neighbors, family, and friends. [Doc. #36 at 17].

In order for individuals to be liable under Section 1985(2), the predominant purpose of the conspiracy must have been to injure the party or witness *in order* to deter him from attending or testifying in federal court. *Montoya*, 614 F.3d at 149. (emphasis in original). There is absolutely no evidence this letter was written or delivered in order to prevent Mr. Mathews or other witnesses from testifying in his case. Defendants were entitled to ask for reimbursement for money improperly paid to Mr. Mathews and for the return of City equipment. They were also entitled to personally deliver the letter to ensure Mr. Mathews received it. The fact the letter states the City will file theft charges if Mr. Mathews fails to timely return City equipment and that Chief Huff was accompanied by armed police officers when delivering the letter, does not show that the purpose was to deter Mr. Mathews or his neighbors from testifying.

The letter's reinstatement of Mr. Mathews's indefinite suspension after the Court of Appeals's decision does not make Defendants liable under Section 1985(2). Plaintiff was indefinitely suspended for misconduct on October 7, 2008. On or about November 10, 2009, a hearing examiner reinstated Plaintiff and ordered back pay. The City of Beaumont successfully appealed to the Court of Appeals Ninth District of Texas, which voided the reinstatement order on August 31, 2011. *Mathews*, 2011 WL 3847338 (20011). Mr. Mathews is correct that the mandate had not yet issued when the City sent the letter on September 27, 2011—it did not issue until December 6, 2011. However, this is irrelevant to Mr. Mathews's civil conspiracy claim since the City *complied* with the Court of Appeals's decision by reinstating his indefinite suspension.

Mr. Mathews claims that the City, knowing the management conference in this case was October 13, 2011, sent the letter from Chief Huff beforehand to "place more pressure on Mr. Mathews by firing him before the management conference in this case occurred." [Doc. # 36 at 16]. This allegation is pure speculation. To survive a motion to dismiss, factual allegations in the complaint must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. Mr. Mathews's complaint does not do so.[10]

3. Alleged Slanderous Remarks made by Defendants

Mr. Mathews alleges that Defendant Chief Huff slandered him by stating under oath that he broke into her car. He also contends that the City Attorney wrongly accused him of beating an individual with a baseball bat. [Doc. # 35 at 4]. Mr. Mathews makes these allegations

[10]Mr. Mathews contends that when ruling on motions to dismiss "Plaintiff's allegations that he was fired in violation of 1985(2)(3) . . . are entitled to be taken as true."[Doc. #35 at 20]. Plaintiff is incorrect. In reviewing a motion to dismiss, the court must accept all well-pleaded facts as true, reviewing them in the light most favorable to the plaintiff. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 372 (5th Cir. 2010). However, the court need not accept as true legal conclusions couched as factual allegations. *Iqbal*, 129 S. Ct. at 1949-50. Plaintiff's allegations are simply legal conclusions.

supposedly in support of his Section 1985 claim. However, even if Defendants did slander Mr. Mathews by making these statements, this does not support a Section 1985(2) cause of action. For individuals to be liable under Section 1985(2), the predominant purpose of the conspiracy must have been to injure the party or witness *in order* to deter him from attending or testifying in federal court. *Montoya*, 614 F.3d at 149. There is nothing in these remarks that would deter a person from testifying in federal court. In fact, it is likely these statements if untrue would actually have the opposite effect—to encourage Mr. Mathews to continue with the present suit.

3. Plaintiff's request for discovery

Mr. Mathews contends that the court should refrain from ruling on Defendants' motion to dismiss because he has been prohibited from being able to obtain discovery, which he allegedly needs to support his allegations set out in his complaint. [Doc. #39, 41]. However, when ruling on a Rule 12(b)(6) motion, the court may consider only the complaint and its proper attachments. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008).[11] While Mr. Mathews is correct in that he may be entitled to limited discovery on the issue of qualified immunity before the court rules on the motion to dismiss, the court did not rule on the merits of Defendants' qualified immunity defense. Rather the court found that, even assuming Defendants had not asserted this defense, Mr. Mathews's complaint fails to assert a claim upon which relief could be granted. Accordingly, Plaintiff's motion to continue the court's ruling on Defendants' rule 12(b)(6) and 12(b)(1) motion [Doc. #39], motions to amend the scheduling order [Doc. #41, #44], motion for scheduling conference [Doc. # 46] are denied as moot.

[11]Plaintiff incorrectly states in his response that 12(b)(6) motions are not favored before any discovery has been conducted. [Doc. #35 at 9].

CONCLUSION

For the reasons discussed above, Defendants' motion to dismiss [Doc. # 31] is hereby granted. Plaintiff fails to state a claim upon which relief can be granted.[12] The court declines to allow Plaintiff another opportunity to replead. Pursuant to the court's Scheduling Order, Plaintiff's deadline to file amended pleadings without leave of court has expired. [Doc. #29]. In addition to his original complaint filed in state court, Plaintiff has filed *three* amended complaints. Courts need not grant a defendant an opportunity to replead if it appears that the plaintiff cannot cure the initial deficiencies in the pleading. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 329 (5th Cir. 2002). Plaintiff has alleged no facts to show that the Texas and federal statutes he cited provide him with a constitutional privacy right in investigative materials or NCIC records. Nor has Plaintiff alleged any facts to show that Defendants engaged in civil conspiracy in violation of 42 U.S.C. § 1985. Defendants' motion to dismiss [Doc. # 31] is therefore **GRANTED** and Defendants' motion for protective order [Doc. #38] and emergency motion to quash Plaintiff's notices of deposition [Doc. #50] are **DENIED** as moot.

So **ORDERED** and **SIGNED** this **13** day of **March, 2012.**

Ron Clark, United States District Judge

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[12]Plaintiff claims his complaint is adequate because his pleading was taken from a previous Section 1983 case filed in this Court, Cause No. 1:06cv0351; *Tejada v. Jefferson County* [Doc. #35 at 18]. Leaving aside the fact that each pleading rises and falls on its own merits, the Defendants in *Tejada* never filed a motion to dismiss. Accordingly, the court never held that the complaint stated a claim upon which relief could be granted.